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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1450

IN THE MATTER OF RALPH E. COREY, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Hawaii entered in this case on November 28, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii, 55 Haw. ——, is reproduced as Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on November 28, 1973 (Appendix B), following the filing of the Court's opinion on October 19 and the denial of a timely petition for rehearing on November 5 (Appendix C). Time to file

this petition was extended by Mr. Justice Douglas to March 28, 1974.[1] Jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

This case raises important questions concerning the procedural safeguards imposed by the Confrontation and Due Process Clauses in disciplinary proceedings in which attorneys may be deprived of their right to

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[1] In granting the extension, applied for on February 15, 1974, more than 10 days prior to the expiration of 90 days from entry of judgment on November 28, the Justice did so "without prejudice to the Court's consideration of whether this application was timely filed."

The application was timely. First, because this case was initiated as an original proceeding in the Hawaii Supreme Court, the judgment entered on November 28 was the first and only judgment ever entered in this matter, and the only "final judgment or decree" from which review could be sought. As such, the situation here is in no sense comparable to cases in which the highest court of a state, following review of a lower court judgment, issues a mandate or remittitur directing the lower court to enter a new judgment in accord with the reviewing court's opinion.

Second, it is the practice in Hawaii to embody the Supreme Court's judgment in a formal document submitted by counsel, approved by a member of the Court, and entered by the Clerk. It is this judgment that was entered on November 28, 1973. The Court's mandate issues at a later date. Rule 10, Sup. Ct. of Hawaii. (Included in Appendix D hereto) Hawaii does not follow the practice of some other jurisdictions wherein judgment is deemed to have been entered immediately upon the denial of rehearing, with "effectiveness" or the issuance of a remittitur or mandate postponed for a period of time. This Court has observed this distinction in passing upon the timeliness of applications for review. Compare *Puget Sound Co.* v. *King County*, 264 U.S. 22 (1924) (measuring time from formal entry of judgment where "however final the decision may be, it is not the judgment.") with *Market Street R. Co. v. Railroad Comm'n.*, 324 U.S. 548 (1945) (ignoring deferred effective date).

practice their profession and forced to suffer the consequences of suspension or disbarment. Accepting the view of the Attorney General that these safeguards did not apply, and ignoring *In re Ruffalo,* 390 U.S. 544 (1968), *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), and *California* v. *Green,* 399 U.S. 149 (1970), the Supreme Court of Hawaii violated petitioner's rights. Review by this Court is particularly urgent here, for petitioner was suspended in original proceedings before the Hawaii Supreme Court, which acted as his initial accuser and his final and only judge. Accordingly, petitioner has never had the benefit of any appellate review of the constitutional questions pertaining to the proceedings before the tribunal which disciplined him. The questions raised are these:

1. Were petitioner's constitutional rights violated when he was suspended from the practice of law by the Supreme Court of Hawaii which, acting as a disciplinary tribunal of original jurisdiction, announced that his conduct would be measured by one standard, then suspended him for alleged violations of different standards?

2. Were petitioner's constitutional rights violated when he was suspended from the practice of law by the Supreme Court of Hawaii which acted on the basis of testimony in a prior civil litigation without affording petitioner any opportunity to confront his accusers and cross-examine them before the tribunal that was to adjudicate his conduct?

3. Were petitioner's constitutional rights to an impartial adjudication violated when he was suspended from the practice of law by the Hawaii Supreme Court where that Court had already publicly accused peti-

tioner of misconduct as an attorney during the course of a civil litigation in which that issue was not involved, and particularly in view of the circumstances that:

(a) The Court's pronouncement in the civil litigation was preceded by a surreptitious campaign by petitioner's adversaries of ex parte communications with the Court;

(b) The Court, contrary to its own long-established practice, conducted petitioner's disciplinary proceeding as an original proceeding, thus bypassing the customary factual hearing before a lower tribunal;

(c) The Court then proceeded to adjudicate solely on the basis of the record of the prior civil litigation and without affording petitioner any opportunity to confront his accusers or to know the standard by which his conduct would be measured.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part that:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

The Due Process Clause of the Fourteenth Amendment provides in pertinent part that no state shall:

> "deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES AND RULES INVOLVED

This case also involves Rules 5, 10 and 16 of the Supreme Court of Hawaii Rules; Canon 9 of the Code

of Professional Responsibility, American Bar Association (1970); and Canons 15, 16, 29 and 32 of the Canons of Professional Ethics, American Bar Association (1908) as made applicable in the State of Hawaii by Rule 16(a) of the Supreme Court of Hawaii Rules. The foregoing Rules and Canons are included in Appendix D hereto. The Order of the Supreme Court of Hawaii amending Rule 16, effective July 1, 1974, is included herewith as Appendix E.

INTRODUCTORY STATEMENT

Petitioner Ralph E. Corey, 55, has lived in Hawaii for over 25 years. Since his graduation from the Harvard Law School in 1954, he has been an active member of the Hawaii bar and twice a primary candidate for the state legislature.

On November 28, 1973, Corey was ordered suspended from the practice of law for a period of six months. This suspension, stayed pending review here, requires Corey to notify all clients of his suspension, and for all practical purposes destroys the practice he built up over 20 years.

The suspension arose from alleged conduct occurring nearly ten years earlier not in the practice of law, but in a corporate real estate venture in which he was a participant. That venture led to civil litigation, an adverse jury verdict against Corey and two business associates, grant of a new trial on the damages issue by the trial judge, and reinstatement of the jury verdict in the Supreme Court of Hawaii. At the same time, the Supreme Court—after a surreptitious campaign of ex parte vilification addressed to members of the Court by Corey's trial court adversaries—included in its opinion

its view that Corey's conduct in his business venture amounted to professional misconduct.

Thereafter, following proceedings against Corey based entirely on the record in that civil litigation, and after additional ex parte communications from Corey's adversaries, the Supreme Court ordered Corey suspended from practice. In doing so, the Court intentionally bypassed its own long established procedures whereby inquiries into professional misconduct are referred to commissioners for hearing.[2] Instead, it invoked a procedure—an original proceeding in the Supreme Court itself—not utilized previously against any attorney. Assuming that continued bar membership is a privilege not protected by procedural due

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[2] The Hawaii Supreme Court has described its *usual* disciplinary procedure as follows:

> "Rule 16 provides for reference to and a hearing by the commissioners appointed thereunder on charges of unprofessional conduct by attorneys of the bar. It contemplates and provides for a full hearing before the commissioners who, at the conclusion thereof, are required to submit a report to the court. If the commissioners find the attorney guilty of unprofessional conduct, he has a right to contest the finding by filing exceptions to the report in this court. The review by this court is on the record alone. There is no trial de novo, as was expressly provided for in our rule governing disciplinary proceedings before the adoption, in 1955, of the present rule 16. (See old rule 19 set out in 39 Haw. at p. 707) . . .
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> • • •
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> "The procedure prescribed by Rule 16 is very practical. Proceedings under the new rule are much more convenient to court and to all parties concerned in a disciplinary hearing than the formerly existing practice of trying disciplinary proceedings anew in this court. The accused attorney's rights are adequately protected. He has full opportunity to be heard and to make his record before the commissioners. Under the new rule he is given ample opportunity in this court to challenge the charge and the findings of the commissioners on that record." *In re Trask*, 46 Haw. 404, at 414-416 (1963).

process, the Court, on the same record which led to its earlier public reprimand of Corey in the civil litigation, found him guilty of conduct warranting suspension. In the process, the Court denied him the right to confront his accusers, to adequate notice of the precise charges against him, and to an impartial tribunal.

STATEMENT OF THE CASE

A. The Business Venture that Led to the Suspension

In 1964, petitioner Corey became a shareholder, vice president, and general counsel of the Kauaian Development Company, Inc. ("Kauaian Development"). The company owned a section of ocean front property upon which it desired to build a hotel-condominium complex. State Savings and Loan Association ("State Savings") agreed to lend construction funds equal to 65 percent of the cost of construction of the complex plus the appraised value of the undeveloped land, or 65 percent of the appraised value of the property as completely developed, whichever was less.

Among the supporting documentation requested and obtained by State Savings were an independent appraisal that estimated the value of the completed project at $1,345,000, and a construction contract that reflected either a total construction price of over $750,000, or, alternatively, cost plus 7 percent. On January 17, 1964, State Savings granted Kauaian Development a loan for $857,000. Corey and Kauaian Development president Kimbrough agreed in writing to be personally liable for construction costs above those provided by the loan proceeds. When State Savings refused to grant the necessary condominium status to the completed project, Kauaian Development defaulted.

B. The Civil Litigation Whose Record Was Relied Upon To Discipline Petitioner

In 1966, State Savings instituted a mortgage foreclosure suit for $1,050,000—representing the unpaid balance of the loan, several mechanics liens, and the costs of foreclosure. State Savings itself bought in the property at court-ordered auction in 1966 for $931,000, creating an alleged "deficiency" of $138,000 after application of the proceeds to its loan. It then resold it nine months later for $1,350,000,[3] making a quick profit on the entire transaction of over $300,000.

But before reselling the complex in June 1967, State Savings sued Corey, Kimbrough and Kauaian Development's secretary-treasurer Young for the alleged deficiency of $138,200—essentially the difference between the auction sale price and the "damages" that had been claimed in the foreclosure suit.[4]

The deficiency suit charged Corey, Kimbrough and Young with fraud in connection with the presentation of the allegedly misleading construction contract. Plaintiff alleged that it had relied on the purported contract for over $750,000 in calculating what it should lend Kauaian Development, but that the actual contract was for only $600,000 plus three condominium

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[3] This sale fully confirmed the accuracy of the independent appraisal submitted by Corey and his associates which had estimated the value of the completed project at $1,345,000. State Savings has never contested the accuracy of the estimate. See Record 282-283; a copy of the certified Record has been filed with the Clerk of this Court.

[4] These "damages" of $138,000 which the Supreme Court of Hawaii ultimately awarded State Savings in 1971, had become a $300,000 profit on the resale four years earlier.

units valued at $60,000. It asserted that the larger contract was fraudulent and had been submitted for the purpose of inducing it to make a larger loan. Defendants denied that the larger contract was fraudulent, that plaintiff was unaware of the second, lower contract, or that plaintiff had in any way relied on the value of the larger contract in making its loan decision.

The case was tried to a jury in 1969, six years after the events in question, two years after State Savings had resold the property at a substantial profit, and without any suggestion that at stake were not only money damages but defendant Corey's right to practice law. At trial, one or another of the three defendants sharply disputed plaintiff's reading of the documents and challenged the testimony of the key relevant witness, State Savings' Ralph Brown, who admitted that his recollection was hazy. (Record 174, 203, 308)

Corey testified that he had not personally prepared any of the financing papers. He conceded that he knew the contractor had subsequently agreed with Kimbrough to enter into a less expensive contract, but he insisted that plaintiff had looked to the appraisal and not to the contract in calculating its loan, and that in the circumstances, he did not believe he owed a duty to State Savings to inform it of the contract re-negotiation. (Record 465-69)

What Corey's role was, what State Savings knew, and what it relied upon were all sharply disputed factual issues. The jury, which was not permitted to learn of State Savings' profitable resale of the property in 1967, found for plaintiff against Corey and Kimbrough on the fraud count. The trial judge, however, ordered

a new trial on the issue of damages under the fraud count.[5]

On appeal, the Supreme Court of Hawaii reinstated the jury's verdict and damage assessment.[6] In doing so, it went far beyond the issues raised to reprimand Corey for his conduct as it read in the record. The Court asserted that

> "Defendants herein misrepresented to a prospective mortgagee the true nature of the contract between developer and contractor upon which the mortgagee relied in determining the amount of the loan. . . . We feel it pertinent to specifically admonish the perpetrators of such conduct. . . .
>
> "In particular, this court questions the status of defendant Corey in this case. Young testified that he relied upon Corey as his attorney during the negotiation for the mortgage. We do not presume to characterize the relationship between Corey and Young in this transaction as attorney-client. And yet an attorney, as an officer of the court, owes a special duty to the public, his client and the bar to keep his conduct beyond reproach, whether it be in or outside the scope of his status as an attorney. A lawyer should avoid even the appearance of professional impropriety. *Code of Professional Responsibility, Canon 9.* The conduct of attorney Corey in this case raises serious questions of impropriety."

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[5] Although the trial judge did not explain his ruling, the defendants had argued that the record did not support, and indeed contradicted, the contention that the alleged misrepresentation proximately caused damage to plaintiff, or that plaintiff had indeed suffered any damage. The Supreme Court assumed that he concluded it was error to exclude evidence of the profitable resale.

[6] *Corey* v. *State Savings & Loan Ass'n.*, 53 Haw. 132, 488 P.2d 703 (1971), *cert. denied*, 406 U.S. 920 (1972).

C. The Ex Parte Campaign Against Petitioner

This judicial pronouncement was preceded by a most extraordinary surreptitious campaign of ex parte communications addressed to the Supreme Court by State Savings' trial counsel, James Campbell, and by its chief trial witness, Ralph Brown, who urged the Court to discipline Corey notwithstanding the pendency of litigation that was likely to, and did, come before the Court.

As the record now discloses, shortly after State Savings commenced its foreclosure suit against Kauaian Development, Campbell filed a complaint with the Hawaii Real Estate Commission. Two days later, he wrote the Bar Association Ethics Committee. Follow-up letters were written. (Record 94-95) Unsuccessful in this effort, Campbell went directly to the Chief Justice of the Hawaii Supreme Court. In a letter dated June 3, 1966 (just five days before the filing of an appeal in the Hawaii Supreme Court from the mortgage foreclosure suit), and under the guise of asking the Court to disqualify petitioner's counsel, Campbell repeated the allegations previously submitted to the Ethics Committee and the Real Estate Commission. (Record 96-98). Neither the Court nor Campbell informed Corey of this communication. Nor was Corey informed that communication with the Court continued even after the mortgage foreclosure appeal was lodged. As briefs were being submitted, Brown was writing to the Court to buttress Campbell's complaint. (Record 100-101) All this took place before Corey took the witness stand in the deficiency suit, on October 2, 1969.

On October 11, 1969, two days after the jury's verdict in the second litigation, Campbell wrote the Chief Jus-

tice to inform him of the result, enclosing a copy of the proposed complaint amended to conform to the proof. He urged the Court, on its own motion, to suspend Corey pending appeal from the jury's verdict. (Record 104-106) Brown wrote the Chief Justice nine days later to inform him that the mortgage foreclosure had resulted in a "loss" to State Savings of $138,000, without disclosing the profit on resale. (Record 106)

On October 22, 1969, three years after Campbell's first communication with the Court, Corey was for the first time notified by the Chairman of the Bar's Committee on Inquiry that charges had been lodged against him and that an investigation was underway. The existence of one letter to the Chief Justice was disclosed at the time. (Record 106)

D. The Disciplinary Proceedings

On August 29, 1972, nearly one year after the Court's opinion in the *State Savings* appeal and nine years after the events in question, the Supreme Court of Hawaii issued to Corey an order to show cause, which stated in its entirety:

> "You are hereby cited and ordered to file on or before October 2, 1972 a written statement showing cause, if any you have, why you should not be censured, suspended, or disbarred from all the courts of the State of Hawaii on the basis of the record in *State Savings & Loan Association* v. *Corey and Kimbrough,* No. 5021.
>
> "A copy of this order shall be served on the Attorney General of the State of Hawaii who is hereby requested, personally or through a deputy, to appear in these proceedings as amicus curiae." (Record 2)

This was all the notice Corey was ever to get from the Supreme Court.

Corey specially appeared to request the recusal of justices who had participated in the *State Savings* appeal and who had already publicly censured him. (Record 7-8) This was denied.[7]

Corey moved to dimiss the show-cause order for failure to provide adequate notice of the charges or, alternatively, for a bill of particulars; and requested a hearing before a fact-finding commission as provided for under the Court's Rule 16(c). (Record 50-51) These requests were also denied.

Finally, Corey sought to bar introduction of the *State Savings* record, claiming that its use would deny him his federal constitutional right to confront his accusers in the forum in which his punishment would be determined. (Record 57) This too was denied.

As to the merits, petitioner denied violating Canon 9, the only legal standard ever cited to him. He asserted that State Savings had not been defrauded, for its sole interest and reliance was on the independent appraisal, the later renegotiation of the construction contract was not material to the loan calculations, and in these circumstances he had no duty to inform State Savings of the change. (Record 46-48)

The Court overruled Corey's procedural objections and directed the Attorney General to file specifications of portions of the record in *State Savings* supporting disciplinary action. Corey was ordered to respond with a counter specification and to submit a written offer of

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[7] Justice Marumoto did recuse himself for unrelated reasons.

proof. Corey responded with a counter specification disputing the sufficiency of the Attorney General's specifications. And he adhered to the position that the Court could not rely on the prior record; that he was entitled, under the Constitution, to examine live witnesses before his judges; and that he should not be confined to submission of a paper case. (Record 158-514)

The Court set "argument" on the specifications and counter-specifications—30 minutes per side. (Record 517) When he formally inquired about the possibility of calling witnesses in his defense, Corey was informed in writing by the Court that "no testimony will be adduced" at this "original proceeding." (Record 523) Following legal argument—all the "original proceeding" Corey was to receive—the Supreme Court ruled that Corey was guilty of misrepresentation amounting to fraud. It found that Corey, as an attorney and corporate officer, was aware of the two differing construction contracts and failed to inform State Savings that the actual construction contract cost was less than the amount represented. Based on these findings, it held petitioner in violation of Canons 15, 16, 29 and 32, and ordered his suspension from practice. Canon 9, the only canon referred to earlier, was not mentioned.

REASONS FOR GRANTING THE WRIT

This petition raises significant issues concerning the extent to which due process and confrontation rights apply in disciplinary proceedings against attorneys. This Court has previously considered the fair notice required in lawyers' disciplinary proceedings. In *In re Ruffalo,* 390 U.S. 544 (1968), the Court concluded that because disciplinary proceed-

ings may culminate in imposition of punishment, such proceedings are adversary or quasi-criminal in nature, and fair notice of charges is essential and must be given before the attorney is compelled to present his defense. In this instance, Corey was denied the fair notice mandated by *Ruffalo*.

Corey was also denied the equally essential right to confront his accusers in the forum in which his "misconduct" was to be decided, for he was not permitted to cross-examine witnesses whose testimony in a prior civil proceeding formed the sole basis of the charges against him. In *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963), this Court held confrontation required in an admissions case. A disciplinary proceeding presents an *a fortiori* case.

And he was denied the right to an impartial tribunal, one that had not prejudged his case or been subjected to ex parte communications. The Supreme Court of Hawaii denied Corey these rights in a proceeding irregular under its own well-established practice.

A. Contrary to This Court's Decision in Ruffalo, Petitioner Was Charged With a Violation of Canon 9 of the New Canons, but Was Found Guilty of Violating Former Canons 15, 16, 29 and 32.

This Court in *In re Ruffalo*, 390 U.S. 544, 550-52 (1968), established that an attorney facing disciplinary action is entitled to "procedural due process," including full and fair notice of the precise standard by which his conduct is to be judged *before* being called upon to make his defense. Corey was denied that essential right of procedural due process.

The show-cause order issued to Corey, the entire text of which is set out above at page 12, referred

to the *State Savings* record as the sole basis for the proposed disciplinary action. It did not specify which conduct addressed in that lengthy record was the subject of inquiry, nor did it identify any canon or other standard by which Corey's conduct was to be measured. All that Corey had to go on was the fact that in its earlier opinion in the *State Savings* case, the Court had focused upon alleged misrepresentation of the true value of the construction contract and had expressly pointed to Canon 9 of the ABA's Code of Professional Responsibility, which provides that: "A lawyer should avoid even the appearance of professional impropriety." Corey's repeated plea for greater specificity and for a bill of particulars was denied.

Canon 9 provides little in the way of notice. But the "Ethical Considerations and Disciplinary Rules" that accompany Canon 9 do provide some content. They indicate that to avoid the appearance of impropriety, a lawyer should not accept private employment in a matter in which he has acted in a judicial capacity, accept employment in a matter in which he had substantial responsibility while a public employee, state or imply that he can improperly influence any tribunal, legislative body or public official, and that he must preserve the identity of funds and property of clients. See DR 9-101, 9-102 of the Code of Professional Responsibility (1970) (Appendix D hereto).

Left to speculate about the focus of the inquiry, Corey speculated in error. For upon reading the opinion announcing his suspension from the practice of law, Corey learned *for the first time* that at issue in the now concluded proceeding was whether he had violated four of the Canons of Professional Ethics of

the American Bar Association, as formulated in 1908 and which applied to the conduct of Hawaiian attorneys back in 1963.[8] He learned also that the Court had concluded that somewhere in the record of *State Savings* there was proof that he had violated Canon 15 (how far a lawyer may go in supporting a client's cause), Canon 16 (restraining clients from impropriety), Canon 29 (upholding the honor of the profession), and Canon 32 (the lawyer's duty in its last analysis).

Corey was not being obtuse. The Attorney General, commanded to serve as *amicus* and to propose the only specifications against Corey, was equally mystified. His legal memorandum to the Court (Record 87-89) referred to none of the 1908 canons ultimately relied upon, but instead dealt only with the new Canon 9 and an obscure statute not mentioned by the Court.

Ruffalo does not permit the imposition of sanctions against lawyers in these circumstances.

B. Petitioner Was Denied His Constitutional Right To Confront His Accusers.

In the context of the disciplinary proceeding, the testimony of Brown, Young and other witnesses in *State Savings* was concededly hearsay, and admissible under no recognized exception to the rule against hearsay other than the "rule" prevailing in some jurisdictions—and argued below by the Attorney General (Record 69-70)—that lawyers facing punishment are not

[8] One may surmise that in the course of its deliberations the Court discovered that Canon 9, which it had referred to in *State Savings*, was not in existence in 1963 when the alleged misconduct occurred, and that it was compelled belatedly to insert into the case the not heretofore mentioned 1908 Canons.

entitled to the benefit of the rules of evidence available to anyone else.

The Supreme Court of Hawaii denied Corey any opportunity to cross-examine Brown, to examine Campbell who was counsel and not a witness in *State Savings,* or effectively to cross-examine Young, who had been a co-defendant and whose testimony was relied upon by the Supreme Court in its initial censure of Corey. Corey had a right to challenge their testimony and to expose their demeanor while under pressure—and to do so in the presence of those who would determine his right to continue to practice law. In foreclosing this opportunity, the Supreme Court of Hawaii denied him his right to procedural due process, including his rights under the Confrontation Clause.

In *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96, this Court held that a law school graduate may not be denied admission to the bar without procedural due process, including "confrontation and cross-examination of those whose word deprives a person of his livelihood." 373 U.S. at 103.[9] If an applicant for admission to the bar is entitled to cross-examine adverse witnesses and to probe ex parte complaints, the plight of a long-time practitioner faced with disbarment or suspension presents an *a fortiori* case.

In other contexts, too, this Court has recognized the necessity for permitting one threatened by adverse governmental action to confront his accusers. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), for example, the Court held that an engineer working on classified government contracts could not be deprived of his

[9] Here, too, ex parte complaints played an improper role in the decision sought to be reviewed. 373 U.S. at 106.

security clearance in a proceeding where he had no chance to confront and examine his accusers—whose "confidential reports" were not unlike the surreptitious ex parte letters sent to the Supreme Court of Hawaii by Campbell and Brown. The Court noted that:

> "While [confrontation] is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might by faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." 360 U.S. at 406.

And in *Goldberg* v. *Kelly,* 397 U.S. 254, 266-70 (1970), this Court ruled that welfare benefits may not be terminated without according recipients their constitutional right to confront and cross-examine adverse witnesses "before the official who finally determines continued eligibility." In language particularly appropriate to the Hawaii Court's insistence that this remain a paper case, Mr. Justice Brennan observed that:

> "Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision. . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269.

Were Corey on trial for an alleged criminal offense, no one would seek to deprive him of his liberty on the transcript of testimony elicited in a prior proceeding—at least where, as here, the witness was available to testify afresh or, at a minimum, to be cross-examined

anew in the very proceeding in which the accused's liberty was at hazard. See, e.g., *Barber* v. *Page,* 390 U.S. 719 (1968), where this Court held that a state hearsay exception was no defense to a confrontation claim where the state made no good-faith effort to produce the absent witness. See also *Motes* v. *United States,* 178 U.S. 458 (1900); *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). This Court has recently held that prior testimony may only be used at a criminal trial—even when the witness had been subjected to cross-examination in the prior proceeding—when "the witness is [now] present and subject to cross-examination [and] there is ample opportunity to test him as to the basis for his former statement." *California* v. *Green,* 399 U.S. 149, 154 (1970), citing 3 Wigmore § 1018. For, as Mr. Justice White noted, "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the confrontation clause." *California* v. *Green,* 399 U.S. at 157. Indeed, in *Mancusi* v. *Stubbs,* 408 U.S. 204, 216 (1972), this Court held that a finding of unavailability is a "requirement of the confrontation clause" when testimony of a previously cross-examined witness is sought to be used. In short, the fact that the witness had been cross-examined in the prior proceeding does not satisfy the Confrontation Clause's requirement that he be subject to examination and his demeanor exposed to the fact-finder in the later proceeding. As put by Mr. Justice Marshall, "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber* v. *Page,* 390 U.S. at 725.

Moreover, notions of fairness and due process preclude use of prior testimony even in a *civil* proceeding involving only money or property—absent a showing that the witness is not now available. That is the rule in Hawaii in ordinary civil cases. *Levy* v. *Kimball*, — Haw. 540 (1970). See also Fed. R. Civ. Proc. 32(a)(3), setting out the limitations on use at trial of a non-party's deposition.

In one trial, counsel may for good tactical reasons elect to allow a witness' testimony to proceed without challenge, acquiesce in otherwise inadmissible testimony, attack a witness from one perspective rather than another, or follow some other course. Among the legitimate considerations which a trial lawyer might take into account are the witness' demeanor on direct examination; the jury's reaction to the witness and to attacks upon him; the stakes involved—the amount in issue and the availability of insurance or some other source of indemnification; how the proceedings seem to be going—i.e., the likelihood of an adverse result; and the interests of other parties. See, e.g., Keeton, Trial Tactics and Methods pp. 94-165 (1973 ed.). The different setting of a second trial might dictate an entirely different course of action.

The present case underscores the wisdom of this rule, now of Sixth Amendment dimension, that the transcript of prior testimony, even when sworn and subject to cross-examination, may not be admitted in lieu of live testimony of an available witness. In the *State Savings* litigation, Corey has reason to believe that he need not tackle the adverse witnesses in all-out fashion, for he reasonably believed that plaintiff could not prove

damages.[9a] Moreover, the special posture of the *State Savings* case put Corey in a difficult position. There were three defendants, each somewhat differently situated. Each had an incentive to put the blame, if any, upon one or more of the others. Defendant Young did follow such a tack, and with success—the jury did not find against him on the "fraud" count. The harder each defendant fought to extricate himself, the easier it would be for plaintiff to sit back and pick up the pieces. Corey, as a lawyer, was likely to be the most vulnerable to mutual recriminations among the defendants.[10]

Needless to say, in a proceeding in which Corey was the only accused and in which his professional life was at stake, an entirely different set of considerations would apply. Here, he would have an unfettered opportunity to attack Brown's glib assurance that he relied on the value of the construction contract and not the independent appraisal, and to challenge the testimony of his former co-defendant Young. And in doing so, he would have the invaluable opportunity to put the demeanor of the witness before the ultimate fact-

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[9a] The discrepancy between the two contracts bore no relation to the damages claimed, and Corey knew at the time of trial that plaintiff had made a handsome profit on the transaction—not the "loss" for which it sought compensation. Indeed, the trial judge set the jury's verdict aside in response to these arguments, affirming the reasonableness of Corey's position.

[10] The Supreme Court did point in its opinion in *State Savings* to defendant Young's effort to blame Corey—testimony Corey was effectively restrained from challenging at trial but which he would be free to attack *in a subsequent disciplinary hearing.*

finders.[11] But the ruling of the Supreme Court of Hawaii that he was to be impaled on the cold record of the prior proceeding deprived him of any opportunity effectively to confront his accusers.

Naked reliance upon the cold record of testimony adduced in a prior proceeding, either civil or criminal, is not uncommon in lawyers' disciplinary proceedings. See, Annotation, *Admissibility in proceeding to inquire into conduct of attorney, of evidence or record in separate proceeding involving or indicating his corrupt or improper conduct,* 161 A.L.R. 898, 901 (1945). But in rejecting Corey's argument that *Ruffalo* entitled him to confront the witnesses against him (and he had never any opportunity to cross-examine Campbell, his surreptitious accuser), Hawaii seems to have gone farther than other states. A few states, like Illinois, apply their regular rules of evidence and exclude from disciplinary proceedings all prior testimony except where the prior witness is no longer available.[12] Others admit such prior testimony despite the availability of

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[11] He would have the right, as described in *Mattox* v. *United States,* 156 U.S. 237, 242-243 (1895) to "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

[12] See, e.g., *People ex rel. Chicago Bar Ass'n* v. *Amos,* 246 Ill. 299, 92 N.E. 857 (1910), where the Court noted over a half century ago that "It is not consonant with law or justice that the respondent's right to practice law should be determined upon evidence which would not be competent against him if he were sued for a debt." *Tennessee Bar Ass'n* v. *Freeman,* 362 S.W. 2d 828 (Tenn. App. 1961).

the prior witness, on the theory that these proceedings are not adversarial, but then permit additional examination as a matter of grace if not of right.[13] Whether any other state relies on prior testimony without providing the accused an opportunity to cross-examine before the disciplining body is not clear.[14] What is clear is that Hawaii's "no testimony will be adduced" rule is unconstitutional. If the "rule" is an anomaly, its correction by this Court is essential to redress a manifest violation of Corey's rights, particularly where as here Corey has had no appellate review.

Where witnesses whose prior testimony is relied upon in lawyers' disciplinary proceedings are available to testify or to be cross-examined, use of their prior testimony without opportunity to cross-examine before the ultimate factfinder raises substantial questions of fairness and constitutional right which need to be addressed by this Court.

C. Petitioner Was Denied a Hearing by an Impartial Tribunal.

If the proceeding below had been a criminal prosecution, the publicly stated prejudgement by the factfinder and the ex parte contacts between the factfinder and Corey's accusers would require reversal here. As Mr. Justice Holmes observed in *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907) "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private

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[13] See, e.g., *People* v. *Howard*, 364 P.2d 380 (Colo. 1961); *Louisiana State Bar Ass'n* v. *Sackett*, 231 La. 655, 92 So. 2d 571 (1957); *In re Lacy*, 112 S.W. 2d 594 (St. L. Mo. Ct. of App. 1937).

[14] See *In re Santosuosso*, 62 N.E. 2d 105 (Mass. 1945).

talk or public print." See *Estes* v. *Texas,* 381 U.S. 532 (1965). Due process also requires disqualification from participating in governmental regulatory adjudication which one has publicly prejudged. See, e.g., *Texaco, Inc.* v. *F.T.C.,* 336 F.2d 754, 759-61 (D.C. Cir. 1964), disqualifying FTC Chairman Dixon from adjudging a cause about which he had previously made a speech containing censure like that addressed here to Corey. The teaching of *Ruffalo* is that no less a standard should apply when a lawyer is faced with disbarment or suspension, for such a proceeding should remain untainted by "private talk" or appearance of partiality. Cf. *Willner* v. *Committee on Character & Fitness,* 373 U.S. at 106; *Greene* v. *McElroy,* 360 U.S. at 497-99.

This was an unusually aggravated situation. The Supreme Court had prejudged the matter, and had done so publicly. If it now found that Corey was not guilty of misconduct, its harsh prior statement would become extremely embarrassing. This is just the kind of "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true. . . ." that must be avoided if due process is to be observed. *In re Murchison,* 349 U.S. 133, 136 (1955), quoting *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). The Court knew, although Corey did not, that it had been the subject of a surreptitious campaign, conducted ex parte, to poison the well. Yet it had no reason to insist upon trying this matter itself. The long established practice in Hawaii, and the only one contemplated by its own Rule 16(c), was to refer all such charges to an impartial tribunal of commissioners. From their determination, the Supreme Court of Hawaii would only act as a reviewing body.

Despite the Court's awareness that it had publicly prejudged the case and had been subjected to "private talk," it went out of its way to depart from existing procedure. It ignored its own Rule 16(c), and jerry-built a special original proceeding before the one set of factfinders who had already prejudged Corey's case.

Corey was entitled to have his professional status adjudicated by an impartial tribunal. His federal constitutional right to that effect was not honored here. The issue requires plenary review.[15]

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[15] On December 27, 1973, only one month after entering judgment against Corey, the Supreme Court of Hawaii announced a revision of its own Rule 16, dealing with disciplinary proceedings against lawyers. The new rule, set out in Appendix E hereto, on its face purports to guarantee to accused lawyers some form of the rights denied to Corey. Accusations against lawyers are to be referred to a professionally staffed commission, whose counsel will conduct investigatons. An accused attorney is expressly entitled to written notice of the charges against him, "sufficiently clear and specific to inform the respondent of the alleged misconduct." Rule 16.7(b) At any hearing on such charges, an accused lawyer is expressly entitled to "confront and cross examine" his accusers and to submit evidence. Rule 16.7(b). Any commissioner called upon to review an investigative report compiled by the commission's counsel is thereafter disqualified from sitting as a judge in the matter. Rule 16.7(a) Following any determination by the commission, there is to be appellate review in the Supreme Court. Rule 16.7(c)

The new rule is noteworthy in several respects. It seems expressly to confer upon accused lawyers some form of the rights denied to Corey. In consequence, it can hardly be argued that policy considerations require that accused lawyers in Hawaii be treated as was Corey.

But enactment of the new rule does not obviate the necessity for review by this Court. First, the new rule does not redress the wkrong to Corey. Second, just as the Supreme Court concluded in Corey's case that it had inherent power to ignore the factfinding procedure provided for in its own Rule 16(c) and substitute for

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant the writ of certiorari to review the judgment of the Supreme Court of Hawaii.

Respectfully submitted,

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it an original proceeding in the Supreme Court, nothing in the new rule precludes the Court from doing so in a future case. In short, the rule is effective only in those cases where the Court chooses to apply it. Third, enactment of the rule does not ensure that accused lawyers in Hawaii, or anywhere else, will be given their federal constitutional right to fair notice of the charges against them, to confront their accusers in the forum in which their conduct is to be judged, and to an impartial tribunal. For absent a decision by this Court that these rights apply, the Supreme Court of Hawaii will be free to interpret the amended Rule 16 as a matter of state, not federal law.